

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Shane Gibson,

Complainant,

v.

ORDER OF DISMISSAL

Kandiyohi County Attorney,

Respondent.

On May 28, 2013, Shane Gibson (Complainant) filed a Complaint with the Office of Administrative Hearings.

The Chief Administrative Law Judge assigned the matter to the undersigned Administrative Law Judge on that date. Copies of the Complaint were sent to the Respondent by facsimile transmission on that day and by certified mail on May 30, 2013. The Respondent filed a response to the Complaint on June 19, 2013.

Matthew Forsgren and Christine Kim, Briggs & Morgan, PLLC, appeared on behalf of the Complainant, Shane Gibson. Ann R. Goering, Ratwik, Rozak & Maloney, P.A., appeared on behalf of the Kandiyohi County Attorney (County).

After reviewing the Complaint and the County Attorney's Response to the Complaint, the Administrative Law Judge concludes that the facts available do not establish a reasonable belief that the County committed a violation of the Minnesota Data Practices Act.

Based upon the record and all of the proceedings in this matter, including the Memorandum below, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is **DISMISSED**.
2. Because the costs of the Office of Administrative Hearings in connection with this matter exceeded the amount of the filing fee, Mr. Gibson is not entitled to a refund of the filing fee under Minn. Stat. § 13.085, subd. 6 (d).

3. Because the Complaint has not been shown to have been frivolous in nature or to have been brought for the purposes of harassment, the Kandiyohi County Attorney is not entitled to recover reasonable attorneys fees under Minn. Stat. § 13.085, subd. 6(e).

Dated: July 12, 2013

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minnesota Statutes § 13.085, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings no later than five business days after the Complainant receives notice that the Complaint has been dismissed for failure to present sufficient facts to believe that a violation of Chapter 13 has occurred. If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear material error and grants the petition, the Chief Administrative Law Judge will schedule the complaint for a hearing under Minnesota Statutes § 13.085, subd. 4.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this Order is the final decision in this matter under Minn. Stat. § 13.085, subd. 5(d), and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

Factual Background

The Complainant, Shane Gibson is a resident of Spicer, Minnesota.¹

Mr. Gibson owns property along Thomel Parkway in Lake Andrew Township. The Gibson property is near parcels that are owned by the Nelson Memorial Land Partnership.²

On or around April 6, 2012, Mr. Gibson cut and removed trees and brush from his property, and areas that were adjacent to his property, along Thomel Parkway. Lake Andrew Township holds a road right-of-way along Thomel Parkway.³

On May 17, 2012, the Kandiyohi County Attorney filed a Criminal Complaint charging Mr. Gibson with criminal damage to property in the first degree. Criminal damage to property in the first degree is a felony-level offense.⁴

The Criminal Complaint alleged that Mr. Gibson “intentionally caused damage to physical property of another without the latter’s consent.” The County claimed that for “approximately 300 feet along the west side of 13th Street N.W. ... trees had been cut from the road to the West side of the easement.” The Criminal Complaint further alleges that the cutting occurred “on the township road right of way or land owned by the Nelson family [causing damage] in excess of \$1,000, estimated at \$13,000.”⁵

After a more detailed investigation by the County Attorney’s Office and a thorough review of the applicable law, the County Attorney moved to dismiss the charges against Mr. Gibson. The case was dismissed on October 5, 2012.⁶

On November 16, 2012, Mr. Gibson’s attorney, Shane Baker, sent a request for data under the Minnesota Government Data Practices Act (MGDPA) to the Kandiyohi County Attorney. The request sought information relating to the felony prosecution of Gibson. Specifically, the request sought data reflecting communications between the Kandiyohi County Attorney’s Office and law enforcement personnel or members of the Nelson family.⁷

¹ Exhibit A to Gibson’s Data Practice Complaint (Complaint).

² Exs. B, C and G to Complaint.

³ Exs. A, B and C to Complaint.

⁴ Ex. A to Complaint.

⁵ *Id.*

⁶ *See, State v. Gibson*, District Court File No. 34-CR-12-377; Ex. F to Complaint.

⁷ Ex. H to Complaint.

By way of a letter dated November 28, 2012, Jennifer K. Fischer, the Kandiyohi County Attorney replied to the request. She stated that the only items that had not been earlier-furnished to Mr. Baker as part of the criminal proceedings, and still in government files, were attorney work-product. She asserted that these items were not subject to public disclosure.⁸

In a follow-on letter, dated January 24, 2013, Mr. Baker again requested disclosure of materials that related to the prosecution of Mr. Gibson.⁹

On February 13, 2013, Ms. Fisher left a voice-mail message for Mr. Baker. In the message she stated that the County Attorney had retained a set of case notes. These notes included electronic messages between attorneys and staff of the County Attorney's Office regarding this case, assessments of the case by the attorneys who were assigned to the matter and detail regarding the County Attorney's post-Complaint investigation. The County Attorney again identified these materials as attorney work-product that is not subject to disclosure.¹⁰

In his Data Practice Complaint, Mr. Gibson asserts that the County Attorney "has provided no basis" for withholding the records as "not public data."¹¹

A telephone Pre-Hearing Status Conference was held in this matter on July 2, 2013. Over the objection of Mr. Gibson, the Administrative Law Judge directed the County Attorney to submit for an *in camera* review the case notes as to which the work product privilege was claimed. Mr. Gibson asserted that an *in camera* review could only occur in the context of an evidentiary hearing, after a probable cause determination had been made.¹²

The County Attorney filed copies of the withheld materials, under seal, on July 3, 2013.

Probable Cause Standard

The purpose of a probable cause review is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.¹³ If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for

⁸ Ex. I to Complaint. The letter also implies that the County Attorney was willing to furnish for a second time those items that could properly be disclosed.

⁹ Ex. J to Complaint.

¹⁰ Ex. K to Complaint.

¹¹ Complaint, at 6.

¹² Digital Recording, *Gibson v. Kandiyohi County Attorney*, OAH 8-0305-30695 (July 2, 2013).

¹³ See, *Kasal v. Picha*, 195 N.W. 280 (Minn. 1923) (probable cause is present where the evidence is conflicting or otherwise 'fairly susceptible of different inferences'); see also, *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

lack of probable cause should be denied.¹⁴ A judge's function in a probable cause determination does not extend to an assessment of the credibility of conflicting testimony; the task is simply to determine whether the facts available establish a reasonable belief that the County committed a violation.

The Assessment Procedure

As noted above, Mr. Gibson objected to an *in camera* review of documents prior to any determination as to a probable violation of the law.

The Administrative Law Judge disagrees. Minn. Stat. § 13.0385, subd. 3 (a) contemplates that the Administrative Law Judge will consider both the averments made in the Data Practice Complaint and the "timely response" of the agency, when making a probable cause determination. Likewise important, the due date by which a response from the agency is considered "timely," is adjustable by the Administrative Law Judge.¹⁵

In this case, it is clear that the contents of the withheld records would inform the Administrative Law Judge's determination as to whether the County Attorney properly invoked the work-product privilege. Indeed, one wonders how anyone could come to an informed view, one way or the other, as to the propriety of the privilege claim, without inspecting the records.

There is no statutory requirement, or useful reason, to schedule an evidentiary hearing so that a judge may adjourn to chambers for an *in camera* review.

The Work Product Doctrine

The work product doctrine extends beyond attorney-client communications to protect from disclosure all "documents and tangible things" that are prepared in anticipation of litigation. The doctrine protects "trial preparation documents that contain the fruits of the attorney's investigative endeavors ... any compendium of relevant evidence prepared by the attorney ... [and] the attorney's mental impressions, opinions and legal theories."¹⁶ Likewise significant, the protections of the work product privilege extend beyond the termination of the litigation for which the materials were prepared.¹⁷

¹⁴ *Pischa*, 195 N.W. at 280-81. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the test for summary judgment. See, *Howie v. Thomas*, 514 N.W.2d 822 (Minn. Ct. App. 1994).

¹⁵ See, Minn. Stat. § 13.0385, subd. 3 (a) ("Within 20 business days after a response is filed, or the respondent's time to file the response, *including any extension*, has expired, the administrative law judge must make a preliminary determination" in the matter) (emphasis added).

¹⁶ See, *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977); accord, *Brown v. St. Paul City Railway Co.*, 62 N.W.2d 688, 701 (Minn. 1954); *City Pages v. Minnesota*, 655 N.W.2d 839, 846 (Minn. Ct. App. 2003).

¹⁷ *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002); *In re Murphy*, *supra*, at 334.

Minn. Stat. § 13.39 carries forward these protections into the MGDPA. This statute relieves attorneys from the obligation to disclose privileged materials that also qualify as “government data.”¹⁸

The Administrative Law Judge’s review of the case notes reveals them to contain items denominated by the state and federal courts as privileged – namely, “trial preparation documents that contain the fruits of the attorney’s investigative endeavors,” a “compendium of relevant evidence prepared by the attorney” and the “mental impressions, opinions and legal theories” of various government attorneys. On this record, one cannot reasonably conclude that the County Attorney committed a violation of MGDPA. The evidence is not conflicting or “fairly susceptible of different inferences.”¹⁹

The appropriate result is dismissal of the Complaint.

E. L. L.

¹⁸ See, Minn. Stat. § 13.393 (“Notwithstanding the provisions of this chapter and section 15.17, the use, collection, storage, and dissemination of data by an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility”); Minnesota Department of Administration Advisory Opinions, Nos. 05-441 and 06-024.

¹⁹ *Pischa*, 195 N.W. at 280.